

11-3899 (L)

In re: Tremont Securities Law, State Law, and Insurance Litigation

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of October, two thousand thirteen.

PRESENT: DENNIS JACOBS,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

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IN RE: TREMONT SECURITIES LAW, STATE
LAW AND INSURANCE LITIGATION

Madelyn Haines and Paul Zamrowski,
Appellants

-v.-

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: October 25, 2013

11-3899
11-3923
11-4022
11-4030*

* 11-4030 is currently the only open case number. The other case numbers have been determined by orders filed Mar. 13, 2013 (11-3899); Apr. 24, 2012 (11-3923); and Oct. 24, 2012 (11-4022).

1 Arthur E. Lange Revocable Trust,
2 Arthur C. Lange, Neal J. Polan, HFM
3 Charitable Remainder Trust, Eastham
4 Capital Appreciation Fund LP, NPV
5 Positive Corp., Daniel Jackson,
6 Laborers Local Pension Plan 17, Arthur
7 M. Brainson, Yvette Finkelstein, and
8 Group Defined Pension Plan & Trust,
9 Chateau Fiduciaire S.A., Matthew L.
10 Klein Irrevocable Family Trust,
11 Harriet Rutter Klein Revocable Trust,
12 Geoffrey Rabie Credit Shelter Trust,
13 and Joanne Brenda Rabie Credit Shelter
14 Trust,

15 Plaintiff-Appellees,

16
17 and
18

19 Massachusetts Mutual Life Insurance
20 Company, MassMutual Holding LLC,
21 Oppenheimer Acquisition Corp.,
22 Tremont Capital Management Inc.,
23 Tremont Group Holdings, Inc., Rye
24 Investment Management, Tremont
25 Partners, Inc., Tremont (Bermuda)
26 Limited, Harry Hodges, Robert
27 Schulman, Jim Mitchell, Rupert Allan,
28 Lynn O. Keeshan, Patrick Kelly,
29 Stephen Thomas Clayton, Stuart
30 Pologe, Cynthia J. Nicoll, Tremont
31 Market Neutral Fund L.P., Tremont
32 Market Neutral Fund II, L.P., Tremont
33 Market Neutral Fund Limited, Tremont
34 Opportunity Fund Limited, Tremont
35 Opportunity Fund II L.P., Tremont
36 Opportunity Fund III L.P., Tremont
37 Arbitrage Fund, L.P., Tremont
38 Arbitrage Fund-Ireland, Tremont
39 Strategic Insurance Fund, L.P., Rye
40 Select Broad Market Fund, L.P., Rye
41 Select Broad Market XL Fund, L.P.,
42 Rye Select Broad Market Prime Fund,

1 L.P., Rye Select Broad Market
2 Insurance Fund, L.P., and Rye Select
3 Broad Market Portfolio Limited,
4 Defendant-Appellees.
5

6 - - - - -X
7

8 **FOR APPELLANTS:** VINCENT T. GRESHAM, Atlanta, Ga.
9

10 **FOR PLAINTIFF-APPELLEES:** ANDREW J. ENTWISTLE (Arthur V.
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14 and Lee M. Gordon, Hagens Berman
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19 Revocable Trust, Arthur C.
20 Lange, Neal J. Polan, HFM
21 Charitable Remainder Trust,
22 Eastham Capital Appreciation
23 Fund LP, NPV Positive Corp., and
24 for the benefit of Nominal
25 Defendants, Daniel Jackson, and
26 Laborers Local Pension Plan 17.
27

28 JEFFREY M. HABER (Stephanie M.
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32 Brainson, Yvette Finkelstein,
33 and Group Defined Pension Plan &
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36 DEMET BASAR (Daniel W. Krasner, *on*
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41 L. Klein Irrevocable Family
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43 Revocable Trust.
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4 Rabie Credit Shelter Trust and
5 Joanne Brenda Rabie Credit
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7

8 **FOR DEFENDANT-APPELLEES:**

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10 *on the brief*), Bingham McCutchen
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12 *appellees* Massachusetts Mutual
13 Life Insurance Company and
14 MassMutual Holding LLC.

15 DAVID A. KOTLER, Dechert LLP,
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22 York, N.Y., *for appellees*
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24 Tremont Group Holdings, Inc.,
25 Rye Investment Management,
26 Tremont Partners, Inc., Tremont
27 (Bermuda) Limited, Harry Hodges,
28 Robert Schulman, Jim Mitchell,
29 Rupert Allan, Lynn O. Keeshan,
30 Patrick Kelly, Stephen Thomas
31 Clayton, Stuart Pologe, and
32 Cynthia J. Nicoll.
33

34 JAMIE B.W. STECHER (Ralph A.
35 Siciliano, David J. Kanfer, Zev
36 Feinstein Raben, *on the brief*),
37 Tannenbaum Helpert Syracuse &
38 Hirschtritt LLP, New York, N.Y.,
39 *for appellees* Tremont Market
40 Neutral Fund L.P., Tremont
41 Market Neutral Fund II, L.P.,
42 Tremont Market Neutral Fund
43 Limited, Tremont Opportunity
44 Fund Limited, Tremont

Opportunity Fund II L.P.,
 Tremont Opportunity Fund III
 L.P., Tremont Arbitrage Fund,
 L.P., Tremont Arbitrage Fund-
 Ireland, Tremont Strategic
 Insurance Fund, L.P., Rye Select
 Broad Market Fund, L.P., Rye
 Select Broad Market XL Fund,
 L.P., Rye Select Broad Market
 Prime Fund, L.P., Rye Select
 Broad Market Insurance Fund,
 L.P., and Rye Select Broad
 Market Portfolio Limited.

Appeal from a judgment of the United States District
 Court for the Southern District of New York (Griesa, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED
 AND DECREED** that the judgment of the district court be
REMANDED.

In this consolidated class action, investors in a group
 of hedge funds that suffered losses in the Madoff Ponzi
 scheme (plaintiffs) sue those funds, the fund managers, and
 their controlling entities (defendants) under federal and
 state law. The United States District Court for the
 Southern District of New York (Griesa, J.) approved a
 settlement and certified the settlement class over numerous
 objections. On this appeal, objectors Madelyn Haines and
 Paul Zamrowski challenge: the fairness of the settlement
 terms; certification of the class; and dismissal of the
 consolidated actions pursuant to Federal Rules of Civil
 Procedure 23 and 23.1. They also argue that the award of
 attorney's fees was an abuse of discretion. We assume the
 parties' familiarity with the underlying facts, the
 procedural history, and the issues presented for review.

By this order, we return the mandate to the district
 court for the limited purpose of deciding an issue that
 potentially moots some of the appellate issues that we would
 otherwise need to decide.

The Rye Funds were "single manager" funds that invested
 all of their assets with Bernard L. Madoff Investment

1 Securities ("BLMIS"). The Tremont Funds were "funds of
2 funds," investing about a quarter of their assets in the Rye
3 Funds (and the rest in unrelated investments) (collectively,
4 the "Funds"). When BLMIS imploded, the Rye Funds became
5 insolvent, and the Tremont Funds lost a quarter of their
6 assets. The plaintiffs claim that the defendants breached
7 their fiduciary duty by investing in BLMIS without
8 conducting proper due diligence, and made false and
9 misleading statements to investors about Madoff's
10 involvement in managing the Funds' assets. The Appellants
11 were investors in two Tremont Funds.

12
13 Settlement talks begun in November 2009 yielded a
14 Settlement Agreement in February 2011. While the settlement
15 negotiations were ongoing, the trustee of the BLMIS
16 bankruptcy estate ("Trustee") sued many of the Settling
17 Defendants (as defined in the Settlement Agreement), seeking
18 recovery of approximately \$2 billion that BLMIS had
19 transferred to the Tremont and Rye Funds prior to the
20 exposure of the Ponzi scheme. The Trustee alleged that the
21 bankruptcy estate could disallow approximately \$3 billion
22 worth of customer claims filed by the Rye Funds unless the
23 estate recovered the \$2 billion of alleged transfers. In
24 July 2011, this matter was settled: in exchange for
25 releasing all claims and allowing bankruptcy claims by
26 certain Rye Funds, the Settling Defendants agreed to pay \$1
27 billion to the Trustee (the "Trustee Settlement"). The \$1
28 billion was financed partially with cash provided by the Rye
29 and Tremont Funds.

30
31 The Appellants allege that the Trustee Settlement was
32 paid in part out of that portion of the Tremont Funds
33 (three-quarters) that was not invested in the Rye Funds--and
34 therefore unrelated to Madoff. Although the parties dispute
35 the matter fiercely, it is clear that Haines and Zamrowski
36 together lost approximately \$80,000 of their non-Madoff
37 investments in that manner.

38
39 The district court held fairness hearings regarding the
40 proposed Settlement Agreement in June and August 2011.
41 During this period, on August 4, 2011, lead counsel notified
42 the district court and the class of the Trustee Settlement.
43 On August 8, the district court found the Settlement
44 Agreement to be fair, adequate, and reasonable. The

1 district court issued orders dismissing the case and
2 approving attorney's fees on August 19. In approving the
3 settlement, the district court's order defined "Released
4 Claims" as:

5
6 known claims and Unknown Claims . . . that have
7 been asserted in the Actions, or, to the extent
8 they relate to direct or indirect investments in
9 or by the Settling Funds . . . that could have
10 been asserted in any forum by Plaintiffs, any
11 Settlement Class Member, any Settling Fund, or any
12 Individual Settling Insurance Plaintiff or any of
13 them against any of the Released Parties that
14 arise out of, or are based upon, or related to,
15 the allegations, transactions, facts, matters, or
16 occurrences, representations or omissions
17 involved, set forth, or referred to in the
18 Complaints filed in the Actions, or that *relate to*
19 *the purchase, retention, ownership or sale of*
20 *limited partnership interests in or shares of the*
21 *Settling Funds or the Settling Funds' investments*
22 *in Madoff.*

23
24 (emphasis added).
25

26 Haines and Zamrowski appealed the district court's
27 order on various grounds. On May 8, 2012, while this appeal
28 was pending, the Settling Defendants made an offer of tender
29 to the Appellants for 100% of Haines's and Zamrowski's share
30 of the Tremont Funds' Rye/Madoff-related losses (\$41,375,
31 and \$88,510, respectively). The Appellants rejected this
32 tender by letter dated May 18. The Settling Defendants
33 moved to dismiss the appeal on the ground that their offer
34 of tender rendered the appeal moot. The Appellants argue
35 that the purported offer falls short of their total losses
36 because they lost an additional \$80,000 of their Tremont
37 investment when the Tremont Funds paid part of the \$1
38 billion Trustee Settlement. The Lead Plaintiffs do not
39 dispute this, but argue that the Trustee Settlement is
40 unrelated to the facts underlying the class claims here, and
41 therefore not at issue.
42

43 We think it is clear that, in the consolidated cases,
44 no claim was expressly raised by the Appellants against the

1 Settling Defendants for the alleged \$80,000 loss arising out
 2 of the Trustee Settlement. The question relevant to
 3 mootness is whether such a claim was released by the
 4 Settlement Agreement in this case. If so, and if the
 5 Appellants would be barred from recovering on that claim in
 6 any future case, the additional \$80,000 in losses would
 7 remain at issue here, and the offer of tender would not have
 8 made the Appellants whole. If, on the other hand, the claim
 9 was not released, the additional \$80,000 in claimed losses
 10 could be litigated in a separate suit against the Settling
 11 Defendants, and the offer of tender would have covered all
 12 of the Appellants' losses related to this case. The
 13 governing principles of mootness are set out in the margin.¹
 14

15 The resolution of this dispute rests on the district
 16 court's definition of "Released Claims." The last clause of
 17 this definition is capacious--it could be argued that a
 18 claim based on the \$1 billion Trustee Settlement was
 19 "relate[d] to the . . . ownership . . . of limited
 20 partnership interests in" the Tremont Funds. Ambiguity of a
 21 contract term "is a threshold question of law for the
 22 court." Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp.,
 23 818 F.2d 260, 263 (2d Cir. 1987). The meaning of ambiguous
 24 language is a question of fact. Hoyt v. Andreucci, 433 F.3d
 25 320, 331 (2d Cir. 2006). The release language cited above
 26 "is susceptible [to] more than one reasonable

¹ Despite the Appellants' status as objectors, the appeal would be moot if the Settling Defendants had tendered the full amount of losses--whatever that may be--to the Appellants. See Breneisen v. Motorola, Inc., 656 F.3d 701, 706 (7th Cir. 2011) ("[O]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate . . . because he has no remaining stake." (internal quotation marks omitted)). The Appellants cite U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), and Deposit Guarantee National Bank, Jackson, Miss. v. Roper, 445 U.S. 326 (1980), which together hold that a class action does not become moot upon offer of tender to the named plaintiff, even if class certification has been denied, because the plaintiff still has a "personal stake" in obtaining class certification on appeal. Neither case applies here because the Appellants are not class representatives.

interpretation," and is therefore ambiguous. Walk-In Med. Ctrs., 818 F.2d at 264. The district court made no explicit findings as to the meaning of this ambiguous release language.

Accordingly, we **REMAND** to the district court, pursuant to the procedure outlined in United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994), for clarification as to the following question: was the Appellants' potential \$80,000 claim arising out of the Trustee Settlement released by the settlement and dismissal of this case?

A mandate shall issue forthwith remanding the case to the district court, where it shall solicit briefing from the parties in an expeditious manner and render a decision within 60 days of the date of this order. After the district court's decision, any party to this appeal may restore jurisdiction to this court within 30 days by letter to the Clerk's Office seeking review, without need for a new notice of appeal. The Clerk's Office will then set an expedited briefing schedule and refer the appeal to this panel.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

 

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

 